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# A Preliminary Framework for Measuring Deference in Rights Reasoning

**Cora Chan***

## 1. Introduction

Courts around the world have converged on three core principles for adjudicating human rights that are subject to a limitation clause. The first relates to the structure of the adjudication – the adoption of a two-stage approach in which courts initially ask whether there has been a prima facie limitation of rights (the rights definition stage) and then, if so, proceed to enquire whether that limitation was justified (the rights limitation stage). The second and third relate to the substantive principles that govern these two stages – at the rights definition stage, the adoption of a generous approach to defining rights, and at the limitation stage, the use of a proportionality test in evaluating the justifiability of a prima facie rights limitation. These principles form part of what Webber calls the "received approach" to the limitation of rights.[1] A corollary of the adoption of these principles is the expansion of judicial powers. Definitional generosity has expanded the scope of governmental action that is subject to judicial scrutiny.[2] Proportionality mandates a more stringent review than orthodox standards of review: the court does not merely assess the reasonableness of a decision, but whether it is necessary and balanced as well.[3] This expansion of judicial oversight has led to concerns that, in adjudicating rights, courts may

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[1] GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009), ch 2. *See also* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72 (2008-09); KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (2012); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

[2] *See e.g.* Stavros Tsakyrakis, *Proportionality: An Assault to human rights?* 7(3) I•CON 468, 480-481(2009); Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7(4) GERMAN LAW JOURNAL 341, 348-349 (2006); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4(2) LAW & ETHICS OF HUMAN RIGHTS 141, 150-151; Kai Möller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW 155 (Grant Huscroft, Bradley W Miller & Grégoire Webber eds, 2014); WEBBER, ibid, at 65-68; MATTHIAS KLATT AND MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 45-48 (2012); MOSHE COHEN-ELIYA AND IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 119-124 (2013).

[3] *See e.g.* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (translated by Julian Rivers, 2002); and sources in notes 1, 10, 23.

intrude into policy issues that they lack the expertise or democratic legitimacy to decide.[4] To allay these concerns, courts have sometimes deferred to legislative or executive judgments in reasoning whether an unjustified rights violation has occurred.[5] The inception of a substantive doctrine that increases judicial supervision of rights has ironically paralleled the rise of an institutional doctrine – deference – that curbs that supervision.[6]

The literature on judicial deference is voluminous.[7] However, there is little discourse on the *methodology* for assessing how deferential judicial *reasoning* is in rights cases, and there has been no attempt to offer a comprehensive, systematic framework for making such assessments. This paper seeks to plug this gap by sketching out a basic framework for measuring deference in rights reasoning in common law jurisdictions.[8]

The backbone of the proposed framework is the set of received principles of rights adjudication outlined above, and its applicability is conditional upon jurisdictions embracing those principles. The principles are applied most often to qualified rights, i.e., rights that are subject to limitation, and the focus of this paper is on these rights.[9] There are various proportionality formulae, and the versions used in this paper are the commonly-used four-limb test, which asks whether a rights limitation 1) pursues a sufficiently important aim, 2) is rationally connected to that aim, 3) is no more than necessary to achieve the aim, and 4) strikes a fair balance between the individual right and public interest,[10] and the three-limb test, which asks the first three questions.[11] Where illustrations are needed, the paper draws upon cases from Canada, Israel, the UK – which adopt the four-limb test – and Hong Kong – which adopt the three-limb test.

This initiative to measure deference may be questioned on a number of grounds. First, deference is difficult to quantify. The objection goes that it is hard to identify objective

[4] *See e.g. infra* notes 21-23, 46.
[5] *See e.g. infra* notes 17-20, 38-44, 48-49, 57-61, 64-70, 72, 76.
[6] *Cf.* Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE LAW JOURNAL 174 (2006)
[7] *See e.g. infra* notes 21-23, 46.
[8] The framework is designed for common law jurisdictions. Owing to differences in inter alia judicial traditions, evidentiary rules and the nature of judicial decision-making between common and civil law jurisdictions, assumptions that hold in the former may not do so in the latter.
[9] Non-qualified rights include those are subject to exceptions (limited rights) and those that are subject neither to exceptions nor to limitations (absolute rights). The proposed framework is equally applicable to these rights if the jurisdiction being examined subjects them to the aforementioned received principles of rights adjudication as well.
[10] *e.g. R v Oakes* [1986] 1 SCR 103 [71] ("*Oakes*"). The formula that asks whether a measure is suitable, necessary and proportionate stricto sensu for achieving a legitimate purpose, adopted in Germany and by the European Court of Justice, in essence asks the same questions, and can be analyzed in the same way as the four-limb formula suggested here. However, the framework is not intended to be applicable to civil law jurisdictions.
[11] *e.g. de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

indicators of deference in a court's reasoning process that would permit quantification. Valid assessments of how deferential a judge is must turn on qualitative interpretations of the judge's reasoning.[12] My reply is that it is possible to elicit observable indicators of deference from the *structure* of rights reasoning provided by the aforementioned principles of rights adjudication, as I endeavour to show herein. Those indicators will provide the basis for quantification. This paper acknowledges that ascertaining deferential attitudes requires close analysis of judicial reasoning. It is not my intention to argue that the proposed framework can supplant such analysis. On the contrary, it is precisely my intention to incorporate qualitative evaluations of judicial reasoning within a quantitative framework.

That intention, an opponent might aver, leads to another problem: qualitative assessments open up room for subjective evaluation and will likely reduce the inter-rater reliability of studies based on the framework. My reply is that, first, a study's reliability can be enhanced by developing, and then making transparent, a specific coding protocol that fleshes out the rules underlying the qualitative judgments.[13] Later in the paper I elaborate upon the framework's qualitative criterion. Second, even if a study based on the framework is not perfectly reliable – and no empirical study ever can be – its findings can still be of value if readers are informed of its reliability. To test that reliability, researchers could, for example, perform a double-blind coding procedure on a representative sample of cases.[14] Readers could then be informed of the convergence rate, which suggests the reliability of the overall study. Finally, one way of ensuring the integrity of studies that incorporate qualitative criteria is for researchers to make known the reasoning underlying their qualitative judgments to allow "others [to] check the extent to which she has drawn acceptable conclusions from the evidence."[15] All of these measures can be taken to safeguard the integrity of studies based on the proposed framework and make transparent the reliability of those studies.

A disclaimer is in place. The proposed methodology can be used to determine how deferential courts *are*. Such descriptive findings on their own make *no normative* claim concerning whether courts are deferring to an appropriate degree, although they do provide the empirical basis for making normative appraisals.

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[12] *cf.* Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENNESSEE LAW REVIEW 567 (2007).

[13] *cf.* Lee Epstein and Gary King, *The Rules of Inference*, 69(1) THE UNIVERSITY OF CHICAGO LAW REVIEW 1 (2002); Lee Epstein and Andrew D Martin, *Quantitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert M Kritzer eds, 2010).

[14] *ibid.*

[15] Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH, *supra* note 13, at 935.

In the remainder of the paper, I first define the focal parameter of deference. Next, I put forward a methodology for measuring it, followed by demonstration of how the proposed framework can be applied in a quantitative study. Throughout the paper, "government" is used to refer to the executive or legislative branch.

## 2. Defining deference

Deference, in its broadest sense, refers to the latitude that courts afford the government for making decisions. Defined in this way, there can be many parameters to deference, such as deference in case outcomes (by upholding a government decision) or deference in the formulation of remedies (by handing down a remedy that affords the government room to refashion polices). The parameter of interest in this paper is deference in the court's *reasoning process* about the merits of an issue. This is a crucial parameter. Rights adjudication often demands courts to determine contested questions of fact, such as the security threat posed by allowing a given individual to enter the country, as well as to make value judgments, such as whether animal welfare is more important than the freedom of fox hunters.[16] When faced with empirical or normative uncertainty, it is common for courts to give leeway to the government in *considering* these issues on the ground that it has more expertise or democratic legitimacy. Typically, this involves lowering the legal standard that the government must satisfy. In the recent UK Supreme Court case of *Tigere*,[17] the barring of foreign students who were de facto settled in the UK from obtaining student loans was challenged for violating their right to education. Lords Sumption and Reed, in dissent, held that because the court lacked the institutional competence to assess socio-economic policies, it would attenuate every limb of the proportionality test by adding the lens of "manifestly without reasonable foundation."[18] Sometimes the courts grant leeway by giving weight to the government's factual or normative assessments. In *Animal Defenders International*,[19] for example, the blanket ban on political advertising on television and radio was challenged for violating freedom of expression. Lord Bingham did not dilute the proportionality formula but was relaxed in assessing its third and fourth limbs. He did not explore the possibility that a

[16] For an exposition of the types of uncertainty that courts face in rights adjudication, *see* A.D.P. BRADY, PROPORTIONALITY AND DEFERENCE UNDER THE UK HUMAN RIGHTS ACT: AN INSTITUTIONALLY SENSITIVE APPROACH (2012).
[17] *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.
[18] [77]-[100].
[19] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

less extensive ban could be equally effective and did not explain why the benefits of the measure outweighed the heavy interference with political expression. Instead, he held that "great weight" had to be attached to the judgment of democratically elected politicians on such issues.[20]

A proper approach to affording latitude to the government in reasoning about rights is key to maintaining the proper boundaries of power between the legislature and executive on the one hand, and the judiciary on the other. If excessive latitude is granted, the courts fall foul of their constitutional role in protecting rights. If, in contrast, insufficient latitude is granted, they exceed their institutional and constitutional remit. It is therefore unsurprising that the affording of latitude has been a prime focus of contemporary debates on judicial deference. Scholars have analyzed the extent of judicial deference in rights reasoning,[21] evaluated whether courts' approach to deference is appropriate[22] and proposed how courts should exercise deference.[23] In the post-Human Rights Act 1998 (HRA) UK, there have been discussions of whether the court exercises "due deference", understood as affording appropriate weight to the government's views.[24] However, before one can evaluate whether courts have been deferring to an *appropriate* degree, one first needs to ascertain the *degree* to which they have been deferring. This paper facilitates investigation of the latter question by proposing a framework for measuring how deferential a court is in its reasoning concerning a rights issue.

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[20] [31]-[33].

[21] *See e.g.* K.D. Ewing, *The Futility of the Human Rights Act*, PUBLIC LAW 829 (2004); Adam Tomkins, *National Security and the Role of the Court: a Changed Landscape?* LAW QUARTERLY REVIEW 543 (2010). *See* also KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 108-109 & ch 9 (2001); Kent Roach, *Judicial activism in the Supreme Court of Canada*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 77 (Brice Dickson ed., 2007).

[22] *See e.g.* note 23 and Richard A. Edwards, *Judicial Deference under the Human Rights Act*, 65(6) MODERN LAW REVIEW 859 (2002).

[23] *See e.g.* BRADY, *supra* note 16; Rivers, *supra* note 6; T.R.S. Allan, *Human Rights and Judicial Review: A Critique of "Due Deference"*, 65 CAMBRIDGE LAW JOURNAL 671 (2006); Aileen Kavanagh, *Defending Deference in Public Law and Constitutional Theory*, 126 LAW QUARTERLY REVIEW 222 (2010); T.R.S. Allan, *Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory*, 127 LAW QUARTERLY REVIEW 96 (2011); Murray Hunt, *Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"*, in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 337 (N Bamforth & P Leyland eds, 2003); Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?* PUBLIC LAW 592 (2003); Alison L. Young, *In Defence of Due Deference*, 72(4) MODERN LAW REVIEW 554 (2009); AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT part II (2009); Jeff King, *Institutional Approaches to Judicial Restraint*, 28(3) OXFORD JOURNAL OF LEGAL STUDIES 409 (2008); Mark Elliott, *Proportionality and Deference: the Importance of a Structured Approach*, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE (Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill & Michael Ramsden eds, 2010).

[24] *See e.g.* Hunt, Kavanagh, Young, *supra* note 23.

There is an abundance of quantitative empirical analysis of the flipside of deference – judicial activism – particularly in US and Canadian scholarship.[25] Quantification models have been proposed to measure such parameters of activism as case outcomes, the extent to which courts expand their jurisdiction by lifting jurisdictional hurdles, rule on issues of substantive policy as opposed to issues concerning the democratic process, and depart from the text or intentions of drafters of the constitution, and whether they exercise broad remedial powers.[26] Scholars posit that the greater the extent of intervention in these respects, the more activist the court is. All of these parameters and the corresponding methodologies used to measure them are relevant to an understanding of judicial attitudes in rights cases, and it is not my aim to evaluate them. I wish only to emphasize that the measurement of judicial deference in the reasoning process over the merits of a rights case has received little attention in comparison.

That is not to say that nothing has been said on the subject. Two studies provide ideas on how deference in rights reasoning may be measured. In a study on the use of proportionality by courts in the UK, Germany, France and Spain and the European Court of Human Rights in mediating conflicts between rights and security, Goold, Lazarus and Swiney use a quantitative framework that codes inter alia whether those courts have applied a proportionality test or only a broad-brush balancing test, as well as the outcomes of judgments – taken as a proxy for how "forgiving" the courts are of the governments' arguments on proportionality.[27] In addition, the researchers study a number of cases qualitatively to ascertain the rigour of the courts' proportionality analyses.[28] Their key

[25] In addition to the sources listed in note 26, other leading works in the US and Canada that propose or apply quantitative methodologies include: William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002); Sujit Choudhry and Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v NAPE*, 48 MCGILL LAW JOURNAL 525 (2003); Christopher P. Manfredi and James B. Kelly, *Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada",* 49 MCGILL LAW JOURNAL 741 (2004); Keenan Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004); Robert M. Howard and Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57(1) POLITICAL RESEARCH QUARTERLY 131 (2004). For a quantitative analysis of substantive judicial review in the US and UK, *see* Eric Ip, *Taking a "Hard Look" at "Irrationality": Substantive Review of Administrative Discretion in the US and UK Supreme Courts*, 34 OXFORD JOURNAL OF LEGAL STUDIES 481 (2014).

[26] This categorization draws on Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C Halpern & Charles M Lamb eds, 1982); Margit Cohn & Mordechai Kremnitzer, *Judicial Activism: A Multidimensional Model*, XVIII No. 2 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 333 (July 2005); STEFANIE A LINDQUIST & FRANK B CROSS, MEASURING JUDICIAL ACTIVISM (2009).

[27] B. GOOLD, L. LAZARUS AND G. SWINEY, PUBLIC PROTECTION, PROPORTIONALITY, AND THE SEARCH FOR BALANCE 1-3, 20 (Ministry of Justice Research Series 10/07, September 2007).

[28] *See, e.g., ibid* at 3, 28-29, 33, 35, 48.

findings include:[29] that proportionality, as opposed to mere balancing, is applied most often in Spain, followed by France, and least often in the UK. The UK also seems relatively forgiving of the government in its proportionality analysis, judging from the government's relatively high win rate in proportionality cases before the House of Lords. Moreover, the qualitative analyses reveals significant variations in the rigour with which proportionality was applied across jurisdictions, ranging from the most rigorous four-limb analysis to a focus on just one or two limbs of the test.

Another relevant study is Davidov and Reichman's quantitative examination of the Supreme Court of Israel's deference to military decisions.[30] The researchers record inter alia the percentage of petitions based on proportionality arguments (as opposed to the less searching ultra vires ground), case outcomes in certain contexts, and the degree to which the courts employed deferential rhetoric.[31] They find that the court has become less deferential over time: proportionality arguments have been deployed more frequently, the rejection rates of petitions in which the military commander appears before the court has declined, and the use of deferential "catch-phrases" has fallen.[32]

Both of the foregoing studies are instructive. The major insights from Goold et al are that: 1) the four-part structure of the proportionality test is an important contributor to the rigour of judicial scrutiny, as a four-limb inquiry is more rigorous than a focus on just one or two limbs or collapsing the test into a mere balancing test; and 2) in applying the proportionality test, courts may be more or less forgiving of the government's arguments. Davidov and Reichman's study reinforces the contribution of proportionality inquiry to the rigour of judicial scrutiny. However, while drawing inspiration from these two studies, this paper seeks to avoid the pitfalls of their methodologies. In particular, I depart from these authors by giving less prominence to case outcomes. This is because outcomes do not accurately reflect the degree of deference in the court's reasoning process,[33] which is the focus of this paper. A court that upholds a government decision is not necessarily accommodative of the government; it may be that the government simply has a very strong case. I also depart from Davidov and Reichman's methodology in not relying on judicial

[29] *Ibid* at ii, 20, 48.
[30] Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel,* 35(4) LAW & SOCIAL INQUIRY 919 (2010).
[31] *Ibid* at 933-934.
[32] *Ibid* at 942-946.
[33] The limitations of quantitative studies of judicial activism that are purely outcome-based are well-documented. *See e.g.* Randy E. Barnett, *Is the Rehnquist Court an "Activist Court" The Commerce Clause Cases,* 73 U. COLO. L. REV. 1275, 1280 (2002); Roberts, *supra* note 12, at 601; Aziz Huq, *When was Judicial Self-Restraint?* 100 CAL.L.REV. 590 (2012).

rhetoric as an indicator of deference, since it is not uncommon to see a mismatch between the approach to deference pronounced by a court and that actually adopted in practice.

From this point onwards, unless otherwise stated, "defer" is used to denote deference in a court's reasoning process over the merits of the government's case.

## 3. Proposed framework

The received principles of rights adjudication outlined at the beginning of the paper give the *structure* of judicial reasoning in qualified rights cases a *predictable core*. Whenever an unjustified rights violation is alleged, the court first needs to define the scope of the right in question and then apply that definition to the facts to determine whether the litigant's acts are protected by the right. If the answer is in the affirmative, the court then needs to assess whether the rights limitation passes the various stages of the proportionality test. This fixed core structure of rights reasoning presents the court with a number of opportunities to afford the government leeway.

First, at the rights definition stage, the court may afford latitude by giving weight to the government's definition of the right or its application of the definition to the facts. There is no opportunity for the court to defer by relaxing the demands of proof on the government because at this stage the burden of proof is on the litigant rather than the government.

Then, at the rights limitation stage, how much leeway the government has depends on how insistent the court is that the government bears the burden of justification, how heavy the court determines that burden to be, and how ready the court is to accept that the government has discharged its burden.[34] Corresponding opportunities for deference can be identified. For example, the court may grant latitude to the government by shifting the burden of justification: requiring the litigant to show that a measure is unjustified rather than the government to show that it is justified. Even when the justificatory burden is on the government, however, the court may grant it leeway by lightening that burden. The heaviness of that burden is controlled by the standard of justification the government has to meet, which comprises two elements. The first is the standard of review – the question of law the government must prove to pass constitutional muster. The court can insist on a measure

[34] *Cf.* Mark Elliott, *From Bifurcation to Calibration: Twin-track Deference and the Culture of Justification*, in THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW: TRAVERSING TAGGART'S RAINBOW 70-71 (Hanna Wilberg & Mark Elliott eds, 2015).

passing the most rigorous four-part proportionality test or can dilute or skip some stages of the test.

Nevertheless, proportionality is a question of *law*, the resolution of which sometimes depends on assessments of *fact*. Hence, even when the standard of review is fixed, the court can still lighten the government's justificatory burden by lowering the standard of proof on questions of fact, which is the second element constituting the standard of justification. For example, the court may require that the government merely show that the attainment of an aim by a measure is not a mere theoretical possibility, or that it is supported by some evidential basis, rather than prove a question of fact to a fair degree of certainty (e.g., on a balance of probabilities).

Finally, in assessing whether the requisite standards of review and proof have been satisfied, the court may relax the degree of cogency of arguments required of the government in such satisfaction. To understand this form of deference, a distinction must be drawn between first-order reasons (or reasons on the merits) and second-order reasons.[35] The former relate to the legal merits of the case in question, whereas the latter are concerns of, say, institutional competence and democratic legitimacy, which are unrelated to the merits of the case but act as "reweighting reasons".[36] If a court defers for second-order reasons, it is treating the government's case as stronger than what the court, on its own balance of first-order reasons, considers it to be.[37]

In determining whether an impugned measure satisfies the proportionality test, courts may require the government to produce cogent first-order reasons for every argument on proportionality. Or they may accept the government's conclusions on proportionality without probing the reasoning behind them, on the basis of second-order considerations. Hence, there were instances in which the government was unable to proffer sufficient first-order reasons to justify the proportionality of a measure (e.g., when it concealed crucial evidence from the court on security grounds), but the court chose to trust its assessments anyway on the basis that it possessed expertise, intelligence information or democratic legitimacy that the court lacked. In these instances, the courts attached great weight to the government's first-order arguments on the basis of second-order considerations, that is, they were willing to accept that the requisite standard of review (say, a four-part proportionality test) and standard of

[35] Kavanagh, *Defending Deference*, *supra* note 23, at 230; Stephen Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913 (1988-89); JOSEPH RAZ, PRACTICAL REASONS AND NORMS ch.1 (1975); [anonymized].
[36] Kavanagh, *Defending Deference*, *supra* note 23, at 223, 233; Perry, *ibid*, at 932; [anonymized].
[37] Perry, *ibid*; Kavanagh, *Defending Deference*, *ibid*; [anonymized].

proof (say, on a balance of probabilities) could be discharged by relatively little first-order justification.

The presence of these opportunities, or what I call strategies, of deference – 1) rights definition, 2) standard of justification comprising a) the standard of review and b) standard of proof, 3) burden of justification and 4) cogency of arguments – can be illustrated by the Supreme Court of Canada's judgment in *Edwards Books*.[38] In this case, a Sunday closing law was challenged for violating the freedom of religion and conscience of shopkeepers whose faiths observed another day as a day of rest. The court first had to define the scope of the freedom of religion: when would restrictions on the practice of a religion constitute interference with such freedom? It then had to apply that definition to the facts: did the burden on shopkeepers imposed by the impugned law amount to interference with their freedom of religion? The first strategy of deference was available to the court. It could give weight to the legal test proposed by the government for determining when a burden amounted to interference with the right in question, or to the way in which it had applied that test to the facts. Dickson CJ (on whose judgment I focus here) did not utilize this opportunity. He reasoned that non-trivial indirect burdens did constitute such interference, and, applying that reasoning to the facts, found that the law imposed a burden on Saturday observers that was not insignificant.[39] He did not accept the government's approach to applying the right to the facts, which treated the alleged burden as a creation of the religion itself rather than of the law.[40] Having found that there was a prima facie limitation of religious freedom, the court then had to decide whether the law was proportionate. Here, the remaining strategies of deference were available to it. It could defer by shifting the burden of justification at one or more stages of the proportionality test onto the litigant, an option it rejected.[41] The court could also loosen the justificatory standard by lowering the standard of proof, but it insisted on proof on a balance of probabilities.[42] However, the court did loosen the standard of review on the third limb of the proportionality test. Rather than require the government to show that the law as drafted was the least intrusive measure, Dickson CJ required only that it show that the measure abridged the right in question "as little as is *reasonably* possible."[43] The court also relaxed the cogency of first-order arguments required from the government to demonstrate that the measure struck a fair balance. The court did not explain how the benefits

[38] *R v Edwards Books and Art Limited* [1986] 2 SCR713.
[39] 752-768.
[40] 763-768.
[41] 768-783.
[42] 768-783.
[43] 772, 779, 781-782.

of the law outweighed the harms. Instead it trusted the government's judgment on the basis of second-order reasons, that is, that the legislature was constitutionally entitled to draw the line by preferring a particular scope of exemption, and that "a serious effort" had been made to accommodate the freedoms of Saturday observers.[44]

It is not my contention that the above-cited opportunities/strategies for deference *exhaust* the available avenues for granting the government leeway in rights reasoning. Rather, they can be considered central to rights adjudication because they arise in a typical case in which both the rights definition and limitation stages are applicable.[45] The ubiquity and prominence of these strategies is evidenced by scholars' frequent reference to them when discussing deference in rights reasoning.[46] It is possible to analyze deference by assessing how far the courts make use of these opportunities for deference.

Conceptually, the two components of the standard of justification – standard of review and standard of proof – are distinct, and can thus be counted as two separate strategies of deference within a framework for measuring deference, culminating in five rather than four strategies. In practice, however, it is often not possible to distinguish between a court's relaxation of the standard of review and that of the standard of proof.[47] In *Sinclair Collis*,[48] for example, a ban on tobacco vending machines was challenged before the English Court of Appeal for violating the right to non-deprivation of property. Recognizing that there was inconclusive evidence over whether the ban would lead to a reduction in under-age smoking, Arden LJ held that the court should not require a "definite link between the evidence and the risk": there was "no need for the court to investigate the scientific evidence," and, as a corollary, the various limbs of the proportionality test should be filtered through the lens of

[44] 777-783.
[45] Barring cases with particular circumstances that render a deference strategy inapplicable, such as those identified in Section 3.3.
[46] **Rights definition:** Young, *supra* note 23, at 555. Edwards, *supra* note 22, at 870-871. **Standard of review and cogency of arguments:** Young, *supra* note 23, at 555; Elliott, *supra* note 23, at 269; Alison L. Young, *Will You, Won't You, Will You Join the Deference Dance?* 34(2) OXFORD JOURNAL OF LEGAL STUDIES 375, 389-390 (2014); [anonymized]; Edwards, *supra* n 22, at 872-882; Ewing, *supra* note 21, at 847; PAUL CRAIG, ADMINISTRATIVE LAW 616-675 (2012); ROACH, THE SUPREME COURT ON TRIAL, *supra* note 21, at ch 9; KIRSTY MCLEAN, CONSTITUTIONAL DEFERENCE, COURTS AND SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 144-145 (2009) at 144-145; Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17(1) EUROPEAN LAW JOURNAL 80 (2011), at 88. **Standard of proof:** Sujit Choudhry, *So What is the Real Legacy of* Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1*, 34 SUPREME COURT LAW REVIEW 501 (2006); Young, *supra* note 46, at 389-390; ROACH, THE SUPREME COURT ON TRIAL, *supra* note 21, at 161, 173; [anonymized]. **Burden of justification:** Gerards, *supra* note 46, at 88; Julian Rivers, *The Presumption of Proportionality*, 77(3) MODERN LAW REVIEW 409 (2014); [anonymized].
[47] Scholars too do not always distinguish between the two concepts. *See e.g.* Elliott, *supra* note 34, at 79-80.
[48] *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437.

"manifest inappropriateness."[49] This could be interpreted as a dilution of the standard of review or as lowering of the standard of proof.

The practical difficulty of distinguishing a court's use of particular components of the standard of justification strategy poses problems for coding them separately in an empirical study. Hence, although the components are conceptually distinct, considering them as one strategy – the standard of justification – facilitates reliable coding on each strategy. This can be accomplished by specifying the most rigorous standard of justification as the four- or three-limb proportionality test (as appropriate) with questions of fact on each limb to be proved on a balance of probabilities, and having the degree of deviation from that standard to be determined by the number of limbs in which the standard is diluted (Section 3.1 will further explain this). This approach does not require researchers to ascertain whether that dilution occurred in the standard of review or standard of proof (which, as we have seen, can be difficult to determine), but only which stages of the proportionality test have been diluted, a relatively straightforward task.

Although the imperative to count the standards of review and proof as a single strategy is practical, the combination is theoretically sound as well. These standards *together* determine the threshold that a government case needs to meet to withstand judicial scrutiny. The concept of the standard of justification represents how *heavy* the justificatory burden is, whereas the cogency of arguments represents how *ready* the court is to accept that that burden has been discharged.[50]

The proposed framework thus relies on four strategies of deference. A court can make use of more or fewer of such strategies, and can be more or less deferential in each. The framework takes into account *both* the *quantity* of strategies used and the *intensity* with which each is used, in measuring the extent to which a court has used the available strategies. It ranks each applicable strategy along a triadic ordinal scale: not deferential (ND), moderately deferential (MD) and highly deferential (HD). The ND category represents the most exacting form of judicial review on a particular strategy that can be expected of courts in jurisdictions that adopt the received principles of rights adjudication. How deferential a court is depends on how far it deviates from this baseline of non-deferential behaviour. HD represents those cases in which the review on a strategy is so lenient that the essence of review on the strategy is lost, and its scrutinizing force is significantly weakened. The MD category falls somewhere

[49] [116]-[180].
[50] *Cf.* Elliott, *supra* note 34, at 79-80, who called deference on the former question "intrinsic deference" and that on the latter, "adjudicative deference".

in between the ND and HD categories, encompassing situations in which the form of review has been relaxed to an extent that it becomes clearly different from the most exacting form of review on that strategy, but not to the extent that it has been stripped of meaningful scrutinizing force.

The ordinal categories are delineated by the criteria in the following section. The unit of analysis is each judge's analysis of each rights issue within a case. The concepts of the applicability of a strategy of deference and of a stage of the proportionality test, referred to in the criteria, are elaborated upon in Section 3.3.

### 3.1 Delineation of ordinal categories

Rights definition

A unit of analysis is categorized as ND if the judge *either* rejects the government's definition of the right in question and its application of that definition to the facts, *or* accepts the definition and application but gives sufficient justification on the merits on why the government's position is preferred.

The concept of "sufficient justification on the merits" (or sufficient first-order justification), which is also used in the indicia for the strategy of "cogency of arguments," requires explanation. This concept imports qualitative judgments into the methodological framework. The court will be considered to have given sufficient first-order justification for accepting the government's position if it has offered a reasonable explanation of why the government's argument is stronger than the litigant's on the merits. In terms of form, an explanation need not address every issue raised by the parties to be deemed reasonable, but it must address all essential issues that divide the parties and explain why the government's case fares better.[51] In terms of substance, a reasonable explanation is one that is logical, is formulated in accordance with objective standards with legal authority (arguments based purely on personal preferences or prejudice clearly do not qualify as such) and is reasonably justifiable by the constitutional values of the jurisdiction being examined.[52] The last-

[51] *Cf.* the requirements of the duty to give reasons at common law. *See infra* note 87.

[52] *See* David Feldman, *Human Rights, terrorism and risk: the roles of politicians and judges,* Public Law 364, 374-375 [2006]. *Cf.* the idea of public reason: JOHN RAWLS, POLITICAL LIBERALISM (2005); Kumm, *The Idea of Socratic Contestation*, *supra* note 2. *See also* David Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture*, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 11 (1998); Dyzenhaus, Hunt and Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 5 (2001).

mentioned values can be ascertained from, among other sources, the text and purpose of the constitutional documents, and will vary across jurisdictions. I return to the issue of cross-jurisdiction variance below.

A researcher need not be *convinced* that the court's reasons for accepting the government's position are *correct* (or *justified*) to find its justification sufficient; s/he need only find that the reasons are *justifiable*, i.e., that they could *reasonably* be considered a product of sound legal reasoning. A researcher may verify whether a given justification could reasonably be accepted by asking whether it has addressed obvious counterarguments to the government's position. For example, assume that a Muslim student in the UK complains that a mixed-faith school's total ban on the wearing of religious symbols violates her freedom of religion, and the school retorts that the ban does not prima facie limit such freedom. The student's case appears plausible because wearing religious symbols is a manifestation of her faith. If the court accepts the school's conclusion without any explanation, then obvious gaps in the school's case are left unaddressed, and the court's explanation (or lack thereof) cannot plausibly be defended as adequate. On the other hand, if the court accepts the school's position but explains how the school accommodates the other religious practices of the student involved and why she can choose to attend a comparable school in the neighbourhood that allows the wearing of religious symbols, then the court's attempt at justification can be considered reasonable.

First-order justification need not be the same as empirical evidence; it can include arguments based on common sense as well.[53] If an argument of the government is truly common-sensical, and hence self-explanatory, the court need not labour in explaining its reasons for accepting it. This brings me back to my earlier point about the context sensitivity of the concept of reasonableness: what constitutes sufficient explanation depends on the legal, political, social and cultural context in which the issue is being examined. In Hong Kong, for example, it is common knowledge that land and housing are scarce and that there is a need to guard against the abuse of public housing resources. A court that accepts these propositions without explanation can still be considered to have given sufficient justification for that acceptance.[54] However, the propositions may not be self-explanatory and may require explication in another jurisdiction. Similarly, whether a reading of a right is reasonable depends on the wording of the text, constitutional values and accepted canons of

[53] For a helpful discussion of this point, *see* BARAK *supra* note 1, 308-312. For an analysis on the standard of proof and nature of evidence required of the government, *see* Choudhry, *supra* note 46.
[54] *See e.g. Chim Sui Ping v Hong Kong Housing Authority* [2012] HKCFI 1427 at [5], [55]-[60].

interpretation, which may differ across jurisdictions. Hence, while it is possible to state at a general level the kinds of reasons that are acceptable (e.g. rationality, reference to objective legal standards and constitutional values), what those reasons require by way of justification depends on the context. A fair assessment of whether a court's attempt at justification is reasonable requires researchers to have an understanding of and sensitivity toward the legal, political, social and cultural environment in which the issues are being decided.

To continue with the elaboration of the ordinal categories on rights definition, a unit of analysis is categorized as MD if the judge accepts *either* the government's definition of the right *or* its application of the definition to the facts without giving sufficient justification on the merits as to why the government's position is preferred. In these situations, review at the rights definition stage has been weakened but can still play some meaningful scrutinizing role.

A unit is categorized as HD if the judge accepts *both* the government's definition of the right *and* its application of the definition without giving sufficient justification on the merits as to why the government's position is preferred. In these instances, scrutiny at the rights definition stage has been significantly slashed.

Where discussions of either the definition of a right or that definition's application are not applicable in the case in question, a unit of analysis is considered ND if the judge rejects, or accepts with sufficient first-order justification, the government's definition or application thereof (whichever is applicable), and HD if the judge accepts that definition or application (whichever is applicable) without such justification. There is no MD category in this instance.

The ND category can be illustrated by the UK Supreme Court's judgment in *In re Medical Costs for Asbestos Diseases ("In re Medical Costs")*.[55] A bill that sought to recover, in certain circumstances, from employers and insurers ("compensators") the costs incurred by the government in treating victims of asbestos was challenged as infringing the compensators' right to peaceful enjoyment of possessions. There was no dispute that an increase of financial burden constituted deprivation of property; the sole issue was whether the bill increased the financial burden of the compensators. On this question the court rejected a number of scenarios sketched by the government that would render the insurers' financial position unchanged, as well as the government's argument that the bill had no impact on "the balance sheet of the insurer."[56] Because only the rights application component

[55] *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3.
[56] [37]-[43].

of this strategy of deference is applicable, the court's non-attenuation of review on that component renders the unit ND on this strategy.

The MD category can be illustrated by the Hong Kong Court of First Instance's judgment in *Chau Tsun Kiu*.[57] Certain legislative provisions allow a candidate standing for election to include promotional materials of other candidates in the same constituency in postage-free letters. The applicant was a candidate who held minority political views. He argued that the practical effect of the provisions was that candidates who were affiliated with other candidates could enjoy more subsidized exposure than those who were not. Hence, the provisions were indirectly discriminatory on the status of non-association with other political parties and candidates. Both the legal test for finding differential treatment and the application of that test were at issue, and the court accepted the government's views on both. On the former, the court did not explain the high threshold it had adopted for finding prima facie discrimination: an *effective causal* link between the ground of discrimination and the discriminatory effects was required to establish *indirect* discrimination.[58] The court did not explain how the high threshold for finding *indirect* discrimination was reconcilable with the entrenched generous approach to defining fundamental rights. However, in applying the high threshold to the facts, the court offered adequate explanation for accepting the government's position: the direct cause of the applicant's disadvantaged position was other candidates' refusal to promote him, "not the reasons behind the refusal".[59] Since the court accepted the government's arguments on one component of the rights definition strategy without giving sufficient justification on the merits, it is coded MD on this strategy.

Finally, the UK House of Lords' judgment in *Gillan*[60] illustrates the HD category. There was no dispute that interference with private life had to reach a certain threshold to engage the right to privacy. At issue was whether the government's authorization for stop and search powers deprived persons of privacy to an extent that reached that threshold. Lords Bingham and Scott's judgments contained scant explanation of why these powers could "scarcely be said to reach" that threshold.[61] Since only the application of definition component was applicable, the court's lack of sufficient justification on that component renders the strategy of rights definition HD.

[57] *Chau Tsun Kiu v Secretary for Justice* [2014] HKCFI 1694.
[58] [40]-[41].
[59] [51]-[54].
[60] *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12.
[61] [28].

Standard of justification

A unit is categorized as ND if the judge subjects the rights limitation to all applicable stages of the multi-limb proportionality test and requires proof of facts at each stage on a balance of probabilities.[62] Whether the three- or four-limb test should be adopted as the maximum standard of justification depends on which formulation is accepted as a principle of constitutional rights adjudication in the jurisdiction involved. An example of ND is Lady Hale's judgment in *Tigere*, which refused to heed the government's request to dilute the proportionality test for adjudicating the right to education, and instead insisted on applying the most rigorous four-limb test.[63]

A unit is categorized as MD if the judge dilutes the standard at one stage of the proportionality test. Such dilution blunts the proportionality test, although the diluted standard can still play a meaningful scrutinizing role. Dilution occurs often at the third limb. In *Edwards Books*, for example, the minimal impairment limb was diluted to a question of whether the measure was reasonably necessary.[64]

A unit is categorized as HD if the judge dilutes the standard at more than one stage of the proportionality test or skips one or more stages. The former occurred in *In re Medical Costs*, where Lord Mance diluted the first to third limbs with the "manifestly without reasonable foundation" lens.[65] The latter occurred in *Gillan*. In assessing whether the stop and search powers were proportionate, Lord Scott collapsed the proportionality inquiry into a single test of fair balance.[66]

Note that a limb of the proportionality test is considered to have been analyzed by the court (i.e., not skipped) if the court pronounces it as a legal test, makes a ruling on it or analyzes it, regardless of the quality of the analysis. The latter issue is dealt with in the "cogency of arguments" section.

If only one or two limbs of the proportionality test are applicable, then a unit is categorized as ND if the court goes through the applicable limb(s), requiring proof of facts on

[62] The balance of probabilities, rather than a higher standard of, for instance, beyond reasonable doubt or absolute certainty, is set for the ND category because it is unrealistic to expect even a rigorous court to generally require a proposition of fact in rights cases to be proved to a standard higher than a balance of probabilities. This civil standard is expressly adopted in Canada and Israel for rights adjudication, and impliedly adopted in the UK through the use of such phrases as proof "on balance". Israel: CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrLR 1. Canada: *Oakes*, at 105. UK: *F v G* [2012] I.C.R. 246 at [48]; *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) at [65].
[63] [27]-[42].
[64] *Supra* note 38.
[65] [45]-[56].
[66] [61]-[63].

a balance of probabilities, and as HD if the court dilutes the standard at, or skips, any of those limb(s). There is no MD category in these instances.

Burden of justification

A unit of analysis is categorized as ND if the judge insists on the government bearing the burden of justification at every stage of the proportionality test asked. *Gillan, Tigere, Animal Defenders International* and *In re Medical Costs* are all examples of the burden of justification remaining with the government throughout the proportionality test.

If the judge reverses the burden of justification at one stage of the proportionality analysis, the unit is coded MD. The demands of proof on the government are clearly lightened, although the burden of justification can still serve some meaningful function because the burden on the other proportionality limbs remains with the government. An example of MD is *Sinclair Collis*. Rather than ask the government to demonstrate that the ban in question was no more than necessary, Arden LJ required the claimant to come up with a case of a proposed alternative being equally effective.[67]

If the judge reverses the burden at more than one stage, the government's onus is substantially lightened, and the unit is coded HD. This was the case in *British Telecommunications*.[68] The applicants challenged certain legislative provisions regulating online copyright infringement on the ground that they violated the rights to privacy and freedom of expression. The English High Court diluted the third limb to a question of whether there was a "clearly less intrusive but equally effective means of pursuing the aim" and the fourth to whether the provisions proceeded on an "obviously flawed assumption".[69] In applying this diluted proportionality test, the court shifted the burden of justification on the whole test onto the litigant: "it is essential not to lose sight of what ultimately a claimant needs to show, namely, that the impugned legislative measure is not proportionate, in other words, that the legislator unlawfully failed to balance the relevant interests at stake, bearing in mind that, for the reasons already given, the court in this type of case, involving economic interests and/or the weighing on competing rights, is likely to accord the legislator a wide area of discretionary judgment."[70]

[67] [164]-[166].
[68] *British Telecommunications Plc, Talktalk Telecom Group Plc v The Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin).
[69] [203]-[246].
[70] [243].

If only one or two limbs of a proportionality inquiry are asked (because the judge attenuates the standard of justification or the other limbs are inapplicable), a unit is categorized as ND if the judge insists on the government bearing the onus of justification on the limb(s) asked, and as HD if the judge reverses the onus on any of them. There is no MD category in this case.

Cogency of arguments

In the framework's final strategy of deference, a unit of analysis is categorized as ND if the judge rejects, or accepts with sufficient first-order justification given, the government's arguments concerning proportionality. A unit is considered MD if the judge accepts those arguments at one stage of the proportionality analysis without giving sufficient first-order justification. The ND and MD categories can be illustrated by Lady Hale's judgment and the dissenting judgment in *Tigere*, respectively. Lady Hale intensely scrutinized all four stages of proportionality. She explained why focusing resources on those students who were likely to remain in and contribute to the UK after their education was a legitimate aim. She then considered whether the bright-line exclusionary rule was rationally connected to that aim and no more than necessary, and came to the conclusion that it could be more narrowly tailored. Finally, she reasoned that the harm done to the important right to education outweighed the administrative convenience of the bright-line rule and the short-term savings to the public purse.[71] The dissenting judges, in applying the diluted "manifestly without reasonable foundation" standard, explained with sufficient justification why the rule did not manifestly lack a legitimate aim or rational connection and why the proposed alternatives were not real alternatives. However, on the question of whether the rule was imbalanced overall, they offered no first-order explanation, relying instead on second-order grounds: that it was important to respect the line drawn by democratically elected representatives.[72]

When the judge accepts the government's arguments at more than one stage without giving sufficient first-order justification, the unit is considered HD. Lord Bingham's analysis in *Animal Defenders International*, discussed earlier,[73] is an example of this category.

To avoid the double-counting of deference on the "standard of justification" and "cogency of arguments" strategies, the cogency of arguments is measured in relation to the standard of justification adopted by the court. If the court has diluted that standard, the

[71] [34]-[42].
[72] [80]-[100].
[73] *Supra* text to note 20.

cogency of arguments is measured in relation to the diluted standard. In *Sinclair Collis*, for example, Arden LJ's judgment is coded HD for the standard of justification because she skipped the fourth limb of the proportionality test and diluted the first three limbs with the lens of "manifest inappropriateness". However, the cogency of arguments is coded ND because she explained why the evidence adduced by the government showing inter alia the percentage of young smokers accessing tobacco from vending machines and the ineffectiveness of the voluntary code designed to reduce the number of under-age sales by the machines demonstrated that the measure was not manifestly inappropriate.[74] Likewise, in *In re Medical Costs*, the standard of justification is coded HD because the first three limbs of the proportionality test was diluted to "manifestly without reasonable foundation", but the cogency of arguments is coded ND because the court carefully scrutinized the government's arguments and found the measure manifestly unreasonable and imbalanced.[75]

Further, when only one or two limbs of the proportionality inquiry are asked, a unit is categorized as ND if the judge rejects, or accepts with sufficient first-order justification given, the government's arguments on those limb(s), and as HD if the judge accepts them on any of those limb(s) without giving sufficient first-order justification. There is no MD category in this case. An example of HD in this situation is *Gillan*, in which Lord Scott, in assessing the single question of fair balance, offered no first-order reason for why the limitation was outweighed by the benefits of the measure: what went onto the "other side of the scale" (the side with the benefits) depended on the government's concealed evidence, which he presumed to be trustworthy.[76]

[74] [86]-[180].
[75] [57]-[70]
[76] [62]-[64].

Table I. Summary of indicia delineating ordinal categories

| **STRATEGY OF EXERCISING DEFERENCE** | **ORDINAL LEVELS OF DEFERENCE** | | |
|---|---|---|---|
| | **ND** | **MD** | **HD** |
| **Rights definition** | Rejecting, or accepting with sufficient justification on the merits given, government's **definition** of right and **application** of definition | Accepting government's **definition** of right OR **application** of definition without giving sufficient justification on the merits | Accepting government's **definition** of right AND **application** of definition without giving sufficient justification on the merits |
| ***Rights definition (if discussions of either definition or its application are inapplicable)*** | *Rejecting, or accepting with sufficient justification on the merits given, government's definition of right or application of definition (whichever is applicable)* | *N/A* | *Accepting government's definition of right or application of definition (whichever is applicable) without giving sufficient justification on the merits* |
| **Standard of justification** | Going through **every** applicable stage of the three- or four-limb proportionality test, requiring proof of facts on a balance of probabilities | **Diluting** standard at **one** stage of the proportionality test | - **Skipping** one or more stages of the proportionality test; OR<br>- **Diluting** standard at **more than one** stage of the proportionality test |
| ***Standard of justification (if only one or two stages of the proportionality test are applicable)*** | *Going through the applicable stage(s) of the proportionality test, requiring proof of facts on a balance of probabilities* | *N/A* | *Diluting standard at, or skipping, any of the applicable stage(s) of the proportionality test* |
| **Burden of justification** | Insisting on government bearing burden of justifying **every stage** of the proportionality test asked | Reversing burden of justification on **one stage** of the proportionality test | Reversing burden of justification on **more than one** stage of the proportionality test |
| ***Burden of justification (if only one or two stages of the proportionality test are asked)*** | *Insisting on government bearing burden of justifying the stage(s) of proportionality asked* | *N/A* | *Reversing burden of justification on any of the stage(s) of proportionality asked* |
| **Cogency of arguments** | Rejecting, or accepting with sufficient justification on the merits given, government's arguments at **every applicable stage** of the proportionality test | Accepting government's arguments at **one stage** of the proportionality test without giving sufficient justification on the merits | Accepting government's arguments at **more than one** stage of the proportionality test without giving sufficient justification on the merits |
| ***Cogency of arguments (if only one or two stages of the proportionality test are asked)*** | *Rejecting, or accepting with sufficient justification on the merits given, government's arguments on the stage(s) of proportionality asked* | *N/A* | *Accepting government's arguments on any of the stage(s) of proportionality asked without giving sufficient justification on the merits* |

### 3.2 Three conditions and a proviso

It has been noted that the proposed framework is applicable only to jurisdictions that adopt the received principles of rights adjudication set out in the Introduction. In this section I highlight three additional conditions for the framework's applicability. The first is that the various limbs of the proportionality test adopted in the jurisdiction in question must play a roughly equally important role in the proportionality analysis, such that, for instance, it would be justified to treat the skipping of one limb as equally deferential to the skipping of another. The four-limb proportionality formula (and hence, also the three-limb formula that covers the first three limbs) used in this paper meet this condition. Each limb serves a distinct and important purpose in safeguarding the constitutional legitimacy of a rights limitation.[77] This claim may be challenged on the ground that the third and fourth limbs of the four-limb formula encompass the second and first limbs, respectively. If a measure is no more than necessary for achieving an aim, it would undoubtedly be rationally connected to that aim. If the measure is balanced overall, then its aim would undoubtedly be legitimate. The objection goes that the first and second limbs are, at best, less important than the other two limbs and, at worst, redundant.

It is true that the third and fourth limbs of the proportionality test are broad inquiries that can encompass the first two limbs. However, the four-part structure breaks down these broad inquiries into smaller questions, each with a different *focus*.[78] The first focuses on screening out aims that are illegitimate in a democracy or insufficiently important to override rights, whereas the fourth focuses on whether the benefit from achieving a legitimate aim outweighs the harm to the right. The second limb focuses on whether the means chosen can achieve the aim, and the third on whether there are less intrusive means that could also do so. The four-part structure compels public authorities to demonstrably justify a rights limitation on all four fronts. The first two parts serve as crucial hurdles in ensuring the justifiability of a rights limitation. The highest courts of both Canada and Hong Kong have found measures that treated sexual minorities differently in lack of a legitimate aim.[79] The Supreme Court of Israel held in *Ressler v Knesset* that a law postponing military service for those devoting their

[77] *See* KLATT AND MEISTER, *supra* note 2, at 71; Denise Réaume, *Limitations on Constitutional Rights: The Logic of Proportionality*, University of Oxford Research Paper Series Paper No. 26/2009; Madhav Khosla, *Proportionality: An Assault on human rights?: A reply*, 8 I•CON 298, 306 (2010); MÖLLER *supra* note 1, at 179.
[78] Rivers, *supra* note 6, at 195; BARAK, *supra* note 1, at 460-461; MÖLLER, *supra* note 1, at 179.
[79] *Vriend v Alberta* [1998] 1 SCR 493; *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335.

lives to the study of the Torah failed to achieve its purported objectives.[80] The first two stages of the proportionality test are *part and parcel* of, as Kumm puts it, a structure for contestation that remedies several "pathologies" that may infect democracies, including "thoughtlessness based on tradition, convention or preference", consideration of illegitimate reasons that exceed the bounds of public reason, and the invocation of "government hyperbole or ideology" which may yield measures that are "not appropriately tailored to engage the realities on the ground."[81]

I therefore consider the four sub-tests of proportionality to be equally important and do not distinguish them for the purpose of measuring deference. However, the fact that an analysis on the third and fourth limbs *may* encompass an analysis on the first two has implications for the *methodology* of determining whether the first two limbs have been skipped. According to the coding principle stated at page 17 above, the second limb can be considered to have been skipped only if it is not asked as a legal test and there is no ruling or analysis concerning it. If a court does not examine the second limb separately, researchers will need to assess a court's analysis on the third limb to determine whether the second limb has been skipped. Because analysis of the third limb may encompass comparing the degree of achievement of an aim by the original measure and that by a proposed alternative, a court's analysis of the third limb may already include some analysis of the second, although, of course, in examining the third limb, a court may also only discuss whether the alternative can achieve the aim without assessing whether the selected means can do so. The same applies to determining whether the first limb has been skipped. If an analysis of the legitimacy of an aim is subsumed into analysis of the fourth limb, the first is not considered to have been skipped. The application of this coding principle is illustrated by the Hong Kong Court of First Instance's judgment in *Chan Hau Man Christina*.[82] Here, the police's prohibition on the applicant demonstrating in a particular area was challenged for violating her freedom of expression. The court did not *separately* ask whether the prohibition was rationally connected to the objective of maintaining public order but, in analyzing whether it was no more than necessary, it reasoned that the means chosen were able to achieve that aim. The second limb is thus not considered to have been skipped.

The two other conditions for the applicability of the proposed framework are that it is applicable only to jurisdictions i) in which the courts are expected to clearly detail their

[80] HC 6298/07 *Ressler v Knesset* (Feb 21, 2012), [19]-[61].
[81] Kumm, *The Idea of Socratic Contestation*, *supra* note 2, at 157-164.
[82] *Chan Hau Man Christina v Commissioner of Police* [2009] HKCFI 708.

reasons in rights judgments and ii) in which judges are generally capable, professional and impartial. The framework assumes that if a court does not elaborate its reasoning in upholding a rights limitation, it is acting deferentially. Imagine that a court merely states that a ban on wearing religious symbols in a mixed-faith school is "proportionate" without giving any reasons. Under my proposals, this court, which fails to expressly reason through the multi-part proportionality test, is considered to have attenuated the standard of justification and cogency of arguments required of the government, and is hence deemed deferential. However, there may be other reasons why a court may not elaborate its reasoning. It may simply be non-communicative. The judicial culture may be such that the courts are not in the habit of giving detailed reasons for their decisions. Thus, an opponent might argue, the proposed proxies for deference (e.g., assessing whether the court expressly goes through the multi-stage proportionality test and communicates first-order justification) may not be valid measures of the concept of deference, defined as giving the government leeway by, say, affording weight to the government's arguments.

This is a powerful objection. My reply is that in jurisdictions in which courts are expected and have the ability to openly explain why a rights limitation should prevail, and in which judges are generally capable and impartial, it is justified to assume that a court that flouts the justificatory expectation is acting deferentially. First, it is widely recognized that the spread of proportionality is concomitant with a shift in culture: from one of authority to one of justification.[83] Legitimate state action is defined by reason rather than authority. In jurisdictions in which the demands of justification are made not just on governmental authorities but on courts as well, a court that fails to transparently explain why a burden on rights should be maintained reinforces the ethos of authority: the litigant must succumb because of the say-so of the public authority and the court. Such a court can then make no complaint if its lack of open justification is *interpreted* by the public as conveying a message of deference to authority.

Second, when the said conditions hold, it is plausible to assume that a court that does not expressly justify a rights limitation is acting deferentially. Possible explanations for its opacity include: 1) the court has plenty of first-order justifications for upholding the limitation, but is too reticent to explain them in its judgment; 2) the court is incapable of formulating or articulating its first-order justifications; 3) the court is acting on irrational

[83] *See e.g.* COHEN-ELIYA AND PORAT, *supra* note 2. See also Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 31 (1994); Dyzenhaus, *supra* note 52.

grounds such as prejudice against the litigant; and 4) the court is deferential, i.e., it may or may not have first-order justifications for upholding the rights limitation, but in any case would like to grant the government leeway on the basis of second-order considerations of democratic legitimacy or expertise, and hence does not openly or intensely scrutinize the first-order arguments against the legal benchmarks.[84]

The first explanation cannot be ruled out, but its possibility is discounted in environments in which judges are under formal or informal pressure to detail its reasons. The second and third explanations are unlikely in jurisdictions in which judges are by and large professional, legally competent and fair-minded. The fourth seems the most plausible. It is conceivable that courts that do not openly assess the strength of a government's first-order case are acting on the basis of second-order institutional or constitutional considerations. Nevertheless, because the first three explanations cannot be entirely ruled out, a proviso needs to be introduced into the framework: the proposed proxies should stand unless there is clear evidence that the court's lack of justification in a particular unit of analysis is due to non-deferential reasons such as those stated in 1), 2) and 3) above, in which case the unit should be discounted from the study. In jurisdictions that meet the stated conditions, such evidence will be rare (if existent at all). Absent such evidence, it is safe to assume that in these jurisdictions courts that fail to openly justify the upholding of a rights limitation are acting deferentially.

Whether judges in a particular jurisdiction are generally capable and professional, and whether there is a constitutional expectation that judges expressly reason through a rights limitation, are empirical questions. A non-conclusive indicator of whether these conditions are satisfied are the criteria for the appointment and performance appraisal of judges in the jurisdiction being examined. In the UK, for instance, these criteria, which are set out by the Judicial Appointments Commission, include fairness and independence of mind, integrity, outstanding legal competence, and the ability to give reasoned decisions.[85] With regard to a judicial justificatory culture, a strong indicator would be the remarks made by judges themselves (writing judicially or extra-judicially) on the need for judicial transparency and

[84] For present purposes, I assume that these second-order considerations of deference qualify as legitimate grounds for a judicial decision, so as to distinguish them from clearly illegitimate grounds such as prejudice, aversion and personal preference (i.e. factor 3). However, as explained in the introduction, this paper makes no normative claim concerning whether and when deference is justified, and hence whether second-order considerations of deference are legitimate grounds for judicial decision-making.

[85] *See* the UK Judicial Appointments Commission's "Judicial Skills and Abilities Framework" https://jac.judiciary.gov.uk/competency-frameworks.

open justice. Such remarks are prevalent in common law jurisdictions.[86] There is also a well-established tradition in these jurisdictions of the courts detailing the reasons for their decisions, with some jurisdictions even going so far as to impose a general duty to give reasons on the courts.[87] Another indicator is judicial practice. If courts in a particular jurisdiction by and large attempt to detail the reasons for their rights decisions, a justificatory culture among the judiciary seems to prevail. It is beyond the scope of this paper to comprehensively assess whether particular jurisdictions satisfy the conditions regarding a judicial justificatory culture and the quality of judges. I will only state that the conditions are without doubt satisfied in the jurisdictions that have been cited to illustrate the framework, and are likely to be satisfied in other common law jurisdictions that adopt the received principles of rights adjudication.

### 3.3 Applicability of deference strategies and stages of proportionality test

A stage of proportionality or strategy of exercising deference is considered applicable if it is feasible to ascertain a judge's deferential attitude in that particular stage or strategy in the given unit of analysis. Whether it is possible to ascertain deferential attitude on a specific strategy depends on the norms of adjudication in the jurisdiction under examination. For instance, the obligation to comply with vertical or horizontal stare decisis may be stronger in one legal system than another. Therefore there can be no universal criteria for determining when a strategy is applicable. In general, however, researchers can consider adopting the following criteria.

Strategy of deference not at issue and not discussed

If a strategy for exercising deference or a component thereof is not an issue between the parties and the court does not discuss it as a result, then it is deemed inapplicable. For instance, in *British Telecommunications*, *Sinclair Collis*, *Tigere* and *Animal Defenders International*, the "rights definition" strategy is considered inapplicable because there was no

[86] *See e.g. Millar v Dickson* [2002] 1 WLR 1614 at [41]; AHARON BARAK, THE JUDGE IN A DEMOCRACY 205 (2008)

[87] *See e.g.* UK: *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381-382; Canada: *R v R.E.M.* [2008] 3 SCR 3 [10]-[68]. Hong Kong: *Securities and Futures Commission v Chui Wing Nin* [2013] 4 HKLRD 492 at [19]-[22].

issue that there had been a prima facie rights limitation and the definition stage was not analyzed as a result.

However, if the court proceeds to analyze a strategy of deference or a component thereof that is not at issue, then that analysis enables us to ascertain deferential attitudes, and the strategy or component becomes applicable. The paradigm case relates to the applicability of the second to fourth strategies of deference. Even if the parties in question agree on the standard and burden of justification and cogency of arguments required of the government, these means of deference are normally still considered applicable because the courts still have to apply – and hence discuss – them, making it possible to ascertain the court's deferential attitude with respect to each.

Court lacks control over strategy of deference

The exemplar of this type of case is where stare decisis is at work. Insofar as non-final national courts are concerned, if courts higher in the national hierarchy have unequivocally determined that a certain standard of justification must apply in relation to the kind of case in question, or have handed down a definition of the right or relevant principle for applying that definition, then the "standard of justification" strategy or relevant component of "rights definition" is not generally considered applicable. The situation may differ when national supreme courts are involved because these courts may have the discretion to depart from their own decisions. If that is the case, even if the highest court previously handed down a standard of justification or definition of the right at issue, those strategies of deference should still be considered applicable in subsequent cases heard by that court.[88]

It must be noted that in no jurisdiction is stare decisis entirely rigid. These are broad guidelines only, and what ultimately counts is whether courts have control over a strategy of deference as a matter of fact. For instance, if in a particular case a lower court does deviate from the standard of justification handed down by a superior court (say, by watering down that standard), then it becomes possible to ascertain the former's deferential attitude on the standard of justification, and this strategy can be considered applicable.

Strategy of deference or stage of proportionality makes no difference and is not discussed

[88] A related situation is when national courts are under the influence of supranational courts. If the former are bound to follow the rulings of the latter, then the aforementioned position in relation to non-final national courts applies. Yet if national courts are not bound to follow the rulings of a supranational court, then the position outlined in relation to supreme courts applies.

If a resolution on a strategy of deference or stage of proportionality analysis can in no way affect the way in which a rights issue will be decided, and the court does not discuss it as a result, then the strategy or stage in question is not applicable. If, however, the court proceeds to discuss a strategy of deference or stage of the proportionality test that will not affect the resolution of the case, that discussion allows us to ascertain deferential attitudes, and it makes sense to consider the strategy or limb applicable. A good example of the latter situation is when a court discusses all limbs of the proportionality test despite finding against the government on sequentially earlier limbs. In that case, all limbs of the test can be considered applicable. Another is when the court takes the view that there has been no prima facie rights limitation, but nevertheless proceeds to discuss whether the measure in question was justified. It would then be appropriate to consider the strategies of deference at the limitation stage applicable.

Stage of proportionality test not relevant

This occurs when the court reverses the burden of justification. The strategy of "cogency of arguments" examines how much evidence the court requires the government to proffer to prove its case. If the court shifts the onus of proof at some stages of the proportionality test onto the litigant, those stages become irrelevant to the discussion on cogency, as in *British Telecommunications* (in relation to all stages of the proportionality test) and *Sinclair Collis* (in relation to the third stage). It thus makes sense to treat those stages of proportionality at which the burden of justification is reversed as inapplicable for the "cogency of arguments" strategy.

### 3.4 From qualitative to quantitative

As discussed thus far, the proposed framework can be used to guide qualitative assessments of the degree of deference. Quantitative analysis becomes possible after weights have been assigned to the strategies of deference, values have been assigned to the ordinal levels, and the formula for calculating deference has been set.

Admittedly, the assignment of weights and values is a major challenge in constructing a template for quantifying deference. My aim here is simply to suggest how such assignment can be approached and to outline a prima facie case for certain weights and values. I do not

seek to argue that the proposed weights and values are definitive. However, until a better case is made for alternative values and weights, I believe the proposed ascription should stand.

The weights of the four strategies of deference should be determined according to their relative contribution to judicial deference in rights reasoning, whereas the values assigned to the ND, MD and HD categories should reflect the intensity of deference of that category. The assignment of weights and values thus hinges on judgments concerning the relative importance of the deference strategies and the deferential levels of the ordinal categories. The relevant perspective from which these judgments should be made is that of a jurist trying to understand the phenomenon of deference in judicial reasoning, not that of the litigating parties. This is because most, if not all, litigating parties are concerned only with the outcome of a case, and it would thus be difficult for them to think purely in terms of the intensity of judicial scrutiny.

To assess the relative contribution of the four strategies of judicial deference, we need to compare, from a jurist's point of view, the impact of 1) deference on each strategy exercised to roughly the same degree on 2) the overall level of deference in that unit of study, other things being equal.[89] If strategy A is more important than strategy B, then deference on strategy A leads to a higher level of overall deference than deference to the same extent on strategy B. Another consideration for the determination of weights is the relative importance of the definition stage and limitation stage in rights adjudication.

Applying these considerations to the four strategies, I believe that all four should be assigned equal weights. Hence, where all four strategies are applicable, they should count equally. If equal weights are assigned, then the rights limitation stage (which contains three strategies) carries more weight than the rights definition stage (which contains only one strategy). This may seem counter-intuitive at first glance. However, the rights limitation stage is widely considered a much more important part of rights adjudication than the definition stage. As mentioned earlier, a principle of rights adjudication that has been received globally is definitional generosity. An upshot of this generosity is that the analysis on limitation has taken centre stage in rights adjudication.[90] It is in line with that focus to assign greater weight to the limitation stage.

[89] For an overview of how weights can be set in multidimensional indices, *see* Koen Decancq and María Ana Lugo, *Setting Weights in Multidimensional Indices of Well-being and Deprivation*, Oxford Poverty & Human Development Initiative Working Paper No. 18, section 4.3 [2009].

[90] *See supra* note 2, esp. Kumm, *The Idea of Socratic Contestation*, at 144-150; *Who is Afraid of the Total Constitution?* at 348.

This still begs the questions of why the rights limitation stage should be given three times the weight of the definition stage and why the three strategies at the rights limitation stage should count equally. The answers boil down to a judgment that the impact on deference of loosening the review on each strategy to the same extent is roughly the same. Compare the impact on deferential reasoning in the four situations below, in which deference is dialed to the maximum on each strategy. To hold other factors constant, assume that the identified strategy is the only applicable strategy in each situation.[91]

1) A court that is highly deferential at the rights definition stage, accepting the government's definition of the right and its application of the definition without giving sufficient justification.
2) A court that is highly deferential on the standard of justification, collapsing the multi-part proportionality test into a single test of whether the measure is manifestly unreasonable.
3) A court that is highly deferential on the burden of justification, requiring the applicant to show that a rights limitation is unjustified.
4) A court that is highly deferential on the cogency of arguments, deferring to the government's judgment that a rights limitation is justified on second-order grounds.

None of these situations seems definitively more deferential than another. If a jurist were asked to choose one or more situations that is more (or less) deferential than another, s/he would likely be indifferent. In all four situations, review of the government's act operates at a minimal level. All four strategies thus have equal potential to switch the court's scrutiny to minimal mode. I therefore propose to weight the four strategies equally.

Moving on to the assignment of values, ND and HD represent the least and most deferential categories of review, respectively. An obvious option is to assign them the values of 0 and 1, respectively. The more difficult question is the value that should be assigned to MD. To reiterate what the MD category represents: situations in which the form of review has been attenuated to an extent that it becomes manifestly different from the most exacting form of review on that strategy, but not to the extent that it has been stripped of meaningful scrutinizing force. In other words, this category is neither very close to ND nor very close to HD. But is it a little closer to ND or to HD and, if so, by how much? This is where our

[91] The other strategies are assumed to not be at issue, to not be under the control of the court in question, to not make any difference and not be discussed, or not to be relevant. *See* Section 3.3. In theory, it is possible for each strategy to be the only applicable strategy for a unit of study. But in practice, the standalone applicability of the three strategies at the limitation stage is unlikely.

cognitive abilities run out. In principle, the scale of deference can admit infinite preciseness. It could run on a continuum of points between 0 and 1, with an interval of 0.1, or on an even finer scale with an interval of 0.05, or even finer still. In an ideal world we would know exactly what type of scrutiny falls into each fine-grained category. In the real world, however, owing to epistemic limitations, we are able to only crudely distinguish levels of deference, lest the criteria become too difficult to apply and judgments become arbitrary.[92] The proposed triadic model is a crude scale. MD, as defined, is distinct from ND and HD by a clear distance; it is more or less half way to HD. Under epistemic constraints, it is sensible to assign MD a mid-point value of 0.5.

The values of 0, 0.5 and 1 are *approximations* of the intensity of deference. As such, the numerical values can function as a heuristic device for *illustrating* relative levels of deference, but they cannot be used to make comparisons with mathematical precision.[93] For example, the framework does not allow us to conclude that judge X is 3.56 times more deferential than judge Y. However, this is not really a concern because mathematical precision is meaningless in this context. What we want to ascertain, and what can be revealed by a framework using approximate figures, are relative measures of deference, e.g., the relative impact of various factors on the level of deference, to determine whether particular judges, courts or periods attract more deference than others. The sensitivity analyses in Section 4 demonstrate that these relative measures are unlikely to change much with slight alterations in the values. The lack of numerical precision is not a problem because we do not need that level of precision to usefully analyze deference.

After weights and values have been assigned, the proposed framework can generate two sets of basic scores: i) a strategy of deference score for each applicable strategy (this score will be 0, 0.5 or 1) and ii) a unit deference score that presents the overall level of deference in a unit of analysis. Two ways of calculating the latter score have been considered. The first is to simply add up the deference scores for each applicable strategy. The second is to take the average, i.e., to add the scores for each applicable strategy and divide the total score by the number of applicable strategies. I propose to adopt the second method because the number of strategies of deference available to the courts, which differs across units of analysis, should not be correlated to the level of deference. Suppose that in both units A and B, rights definition is not an issue. For unit A, all three strategies at the rights limitation stage are

[92] Alexy makes a similar point in defending a triadic classification of rights violations: "The graduation in terms of light, moderate, or serious is often difficult enough as it is… Legal scales can thus only work with relatively crude divisions…" *Supra* note 3, at 99, 408-413.
[93] Canon, *supra* note 26, at 412; ALEXY *supra* note 3, at 97-99.

applicable, whereas for unit B, only two strategies are applicable because the court is bound by a higher court on the standard of justification. Assume that for both units, the court is highly deferential on all available strategies. If only the sum of the strategy scores were considered, then unit A, which has a sum of 3, would appear to be more deferential than unit B, which has a sum of 2. That would give a misleading impression. Unit A should not be considered more deferential simply because more strategies of deference *happen* to be available to it. The taking of an average accommodates the diverging number of applicable strategies in rights cases by measuring the extent to which courts make use of the opportunities for deference *available* to them.

## 4. Illustrations

We are now in a position to see how the quantitative framework can be applied. Table II pulls together the deference scores of the UK units of analysis that have been discussed thus far, with the most deferential unit at the top. The rationale behind the coding has been explained above.

Table II. Deference scores on selected cases

| UNIT OF ANALYSIS: CASE/COURT/JUDGE/RIGHT | STRATEGY OF EXERCISING DEFERENCE | | | | UNIT DEFERENCE SCORE |
|---|---|---|---|---|---|
| | DOR | SOJ | BOJ | COA | |
| *British Telecommunications v The Secretary of State for Business, Innovation and Skill* /HC/Parker J/Freedom of expression & right to privacy[94] | - | 1 | 1 | - | 1 |
| *Gillan v Commissioner of Police for the Metropolis*/HL/ Lord Scott/Right to privacy [95] | 1 | 1 | 0 | 1 | 0.75 |
| *Sinclair Collis Ltd v Secretary of State for Health*/CA/ Arden LJ/Right to peaceful enjoyment of possessions[96] | - | 1 | 0.5 | 0 | 0.5 |
| *Tigere v Secretary of State for Business, Innovation and Skills*/SC/Lords Sumption and Reed/Right to education[97] | - | 1 | 0 | 0.5 | 0.5 |
| *Animal Defenders International v Secretary of State for Culture, Media and Sport*/HL/Lord Bingham/Freedom of expression[98] | - | 0 | 0 | 1 | 0.33 |
| *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*/SC/Lord Mance/Right to peaceful enjoyment of possessions[99] | 0 | 1 | 0 | 0 | 0.25 |
| *Tigere v Secretary of State for Business, Innovation and Skills*/SC/Lady Hale/Right to education[100] | - | 0 | 0 | 0 | 0 |

[94] *Supra* text to notes 68-70 and pp 18, 26, 28.
[95] *Supra* text to notes 60-61, 66, 76 and p 17.
[96] *Supra* text to notes 48-49, 67, 74 and pp 26-28.
[97] *Supra* text to notes 17-18 and pp 17, 26.
[98] *Supra* text to notes 19-20, 73 and pp 17, 26.
[99] *Supra* text to notes 55-56, 65, 75 and p 18.
[100] *Supra* text to notes 63, 71 and pp 17, 26.

DOR: Definition of right; SOJ: Standard of justification; BOJ: Burden of justification; COA: Cogency of arguments. HC: High Court; CA: Court of Appeal; HL: House of Lords; SC: Supreme Court. '–' denotes "not applicable".

These illustrative findings demonstrate the proposed framework's ability to expose the multi-faceted nature of deference and broaden our perspective in appraising it. As can be seen from the table, a unit may score HD on one strategy but ND on another. The framework provides a systematic way of assembling a comprehensive picture of courts' deferential outlook. Also, breaking down each unit of analysis by strategy of deference facilitates the detection of inconsistencies in judicial attitudes. For example, looking at the COA column, we can see that even when the same right is involved, say the right to education, the cogency of arguments demanded by the court varies. Further, the table allows us to compare the levels of deference across cases and within a case.

These illustrative units are not a representative sample of all HRA cases and cannot be used to distill patterns in judicial attitudes. Such distillation, however, would be possible if the framework were applied to a large-scale study. At the time of writing, the framework is being applied to a study of human rights judgments handed down by the courts of Hong Kong since the territory's return to Chinese sovereignty. That study is still underway, and its full and final results will be reported in a separate paper. My aim here is to use some preliminary results from the study to highlight the kinds of findings that a quantitative use of the framework can yield.

In the period under study (1997-2014), 131 cases (broken down into 385 units of analysis) in which a measure was challenged for violating a right to which the proportionality test applies were identified. Each unit of analysis has been coded with strategy of deference scores, a unit deference score, and the following variables.

- Year of judgment
- Date of judgment
- Court
- Type of decision being challenged[101]
- Judge
- Judicial era[102]
- Presence of dissenting judgment (yes or no)

[101] Primary legislation; policy; subsidiary legislation; individual decision of the executive; court-developed principle and judicial act; act of the police, investigative authority, regulatory body or tribunal; decision of a professional body; other.
[102] Whether it was handed down when Li or Ma was Chief Justice.

- Category of rights[103]
- Moral controversy (yes or no)
- Political sensitivity (yes or no)
- Allocation of scarce resources (yes or no)
- Substantial financial implications on government (yes or no)
- Immigration control (yes, non-residents; yes, residents; no)
- Related to election or development of political parties (yes or no)
- Number of judicial review applications for the year in question
- Number of judicial review applications for previous year
- Outcome in that particular unit of analysis (for or against the government or partial)

The following variables have been coded for specific types of rights.

- Seriousness of the allegation or interest at stake (high or low)[104]
- Presence of an identified vulnerable minority (yes or no)[105]
- Political expression, commercial expression or neither[106]
- Whether case was handed down before or after *HKSAR v Lam Kwong Wai*[107]
- Whether case was handed down before or after *Lam Siu Po v Commissioner of Police*[108]

These variables have been defined, and a scheme for coding them has been developed. The choice of variables to be coded should be determined by the hypotheses that the researcher wishes to test. The above-cited variables have been chosen to test certain assumptions about the deferential behaviour of the Hong Kong courts, such as that certain judges are more deferential than others; that certain types of decisions attract more deference than others; that courts are more deferential when a case involves a moral controversy, the allocation of scarce resources, or is politically sensitive; that the courts are more deferential when more judicial challenges against the government have been brought; and that certain landmark cases have an impact on the level of deference in subsequent cases.

To test the effects of multiple variables on the level of deference, multiple regression analysis can be conducted using the unit deference score as the dependent variable and the factors to be tested as the independent variables. See Column A of Table III that presents the

[103] Access to court; equality; expression, assembly and association; fair hearing; legal representation; movement; political participation; presumption of innocence; privacy; property; welfare, occupation and family.
[104] Coded for units on access to court, fair hearing, legal representation, and presumption of innocence.
[105] Coded for units on equality.
[106] Coded for units on expression, assembly and association.
[107] [2006] 3 HKLRD 808. Coded for units on presumption of innocence.
[108] [2009] 4 HKLRD 575. Coded for units on legal representation.

preliminary results of a multiple regression analysis using SPSS.[109] Only variables that are statistically significant at the $p < 0.05$ level are shown.[110] The coefficient indicates the change in the expected unit deference score (with 0 as the least deferential score and 1 as the most) when an independent variable is present, holding other variables constant. Positive coefficients indicate that the presence of the factor in question renders a court more deferential, whereas negative coefficients indicate that its presence renders a court less deferential. These results enable us to conclude that the presence of certain factors renders a unit more or less deferential and to determine the relative force of those factors. For example, they show that in freedom of expression cases, the courts are considerably less deferential when commercial expression is at stake. The findings also tell us that if the decision under challenge is a policy or individual decision by the executive, involves rights to political participation or a moral controversy, or attracts a dissenting judgment, the courts are less deferential, although the anti-deference force of these factors is not as great as that of commercial expression. The presence of immigration concerns regarding non-residents, when combined with the presence of welfare, occupation and family rights, renders a unit significantly more deferential. If the decision at issue is made by a professional body, involves welfare, occupation and family rights or (non-commercial and non-political) expression rights, or is politically sensitive, the courts are also more deferential. Other factors that render a court more deferential include the decision under challenge involving an allocation of scarce resources or being primary legislation, although their deferential force is not as great as the factors just named. And so on and so forth. These results enable researchers to test various hypotheses concerning deference. For example, they show that the assumption that politically sensitive cases attract greater deference is founded, whereas the assumption that a moral controversy does so is not – in fact, the courts are found to be less deferential when the case involves such a controversy.

Because of methodological limitations the results cannot be used to draw comparisons with mathematical precision (e.g., to conclude that the deferential impact of a decision being that of a professional body is 2.187 times that of it being primary legislation). However, there is no need to draw comparisons with such precision.

To test how sensitive the results are to the assigned values, sensitivity analyses have been conducted using 0.4 and 0.6 as the respective values for MD. Columns B and C of Table

[109] Regarding the "judges" variable, only judges with 10 or more data points were included in the regression.
[110] The variable "number of judicial review applications for the previous year" is also omitted from the table. Although it is statistically significant, its coefficient (-0.001) is negligible.

III present the results of these analyses. Unsurprisingly, the list of statistically significant variables and their relative impact do not change much. Compared with the results of the 0.5 analysis, the only discrepancies are as follows. 1) "Seriousness of allegation" in "fair hearing" and "presumption of innocence" cases appear statistically significant only in the 0.4 and 0.6 analyses, respectively, and 2) there are slight changes in the relative force of the factors marked with an asterisk in those analyses. These tests demonstrate two points. First, most of the obtained results are not sensitive to slight changes in the values. Second, it is possible for researchers to enhance the rigour of the study by running sensitivity tests using neighbouring values and counting as significant only those variables that are revealed as significant across different values. All in all, for the purpose of obtaining meaningful comparisons of deference, it suffices to assign approximate values; it is unnecessary to pin down the ordinal categories with exact numerical precision.

Table III. Comparison of regressions with different MD values

| | **A** | **B** | **C** |
|---|---|---|---|
| **Value of MD** | **0.5** | **0.4** | **0.6** |
| **Independent variable** | **Coefficient** | | |
| Commercial expression (for cases on Freedom of expression, assembly and association) | -0.697 | -0.700 | -0.744 |
| Type of decision: Policy | -0.299 | -0.297 | -0.319 |
| Type of decision: Individual decision of the executive | -0.280 | -0.283 | -0.301 |
| Category of right: Political participation | -0.176 | -0.173 | -0.195 |
| Moral controversy | -0.160 | -0.151 | -0.182 |
| Presence of dissenting judgment | -0.128 | -0.131 | -0.140 |
| Type of decision: Act of the police | -0.115 | -0.101* | -0.132 |
| Post-*Lam Kwong Wai* (for cases on right to presumption of innocence) | -0.112 | -0.105* | -0.116 |
| Judge: Ma | -0.095 | -0.094 | -0.096 |
| Judge: Bokhary | -0.092 | -0.092 | -0.092 |
| Seriousness of allegation (for cases on fair hearing) | NS | -0.073 | NS |
| Seriousness of allegation (for cases on right to access to court) | -0.064 | -0.068 | -0.074 |
| Seriousness of allegation (for cases on presumption of innocence) | NS | NS | -0.056 |
| Type of decision: Primary legislation | 0.107 | 0.104 | 0.108 |
| Allocation of scarce resources | 0.163 | 0.154 | 0.165 |
| Category of right: Property | 0.178 | 0.175 | 0.170 |
| Political sensitivity | 0.264 | 0.276 | 0.253 |
| Category of right: Expression, assembly and association (when neither commercial nor political expression is involved) | 0.319 | 0.313 | 0.352* |
| Category of right: Welfare, occupation and family | 0.331 | 0.330 | 0.331 |
| Type of decision: Decision of a professional body | 0.341 | 0.351 | 0.327* |
| Immigration concerns regarding non-residents + welfare, occupation and family rights | 0.782 | 0.786 | 0.777 |

*"NS" denotes not significant at the $p < 0.05$ level*
**ranking of coefficient different from that in the 0.5 analysis*
*0.5 analysis - $R^2$: 0.526 Constant: 0.296*
*0.4 analysis - $R^2$: 0.517 Constant: 0.278*
*0.6 analysis - $R^2$: 0.535 Constant: 0.317*

None of these findings could be produced from purely qualitative analyses of deference. The results of a quantitative study based on the proposed framework would enhance our understanding of the courts' approaches to deference and enable predictions of judicial behaviour. In addition, they imbue the oft-made descriptive statements and normative evaluations of existing approaches to deference with an empirical underpinning. Before we can say that courts are particularly deferential when dealing with morally controversial matters, and that as guardians of minority rights it is inappropriate for them to so defer, it is first necessary to determine whether the courts are indeed more deferential in adjudicating such matters. Findings resulting from use of the proposed framework would furnish a much-needed systematic empirical foundation for testing assumptions about deferential behaviour.

## 5. Conclusion

This paper outlines a preliminary framework for measuring judicial deference in rights reasoning in common law jurisdictions. It is hoped that the framework will facilitate evaluations of how deferential courts are in rights adjudication – evaluations that scholars frequently make – and lay a methodological foundation for quantitative studies of judicial deference, ultimately enhancing our understanding of this increasingly important phenomenon. The framework is "open to and indeed, cries out for further refinement."[111] At the very least, it is hoped that the paper provides the impetus for discourse on the important but neglected issue of how to determine the degree of deference in rights reasoning.

[111] Canon, *supra* note 26, at 414.